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MEMORANDUM

September 12, 2007

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Ben Stevens, Lona Ibanitoru
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Donald Smith, Norma Ross, Kris Goodwill
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METLAKATLA INDIAN COMMUNITY
Mayor Wellington, Paul Brendible, Rachael Askren
MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
Billy Cypress, Mike Hernandez, Dexter Lehtinen, Dione Carroll
MISSISSIPPI BAND OF CHOCTAW INDIANS
Beasley Denson, Lenor Scheffler, Dr. Kenneth York, Walt Rudolph
SEMINOLE TRIBE OF FLORIDA
Jim Shore, Jane Wilson
SHOALWATER BAY INDIAN TRIBE
Charlene Nelson, Pam Norris

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *National Business Center Seeks to Reverse Policy Allowing 50% of Tribal Council Costs in Indirect Cost Pool*

The National Business Center (NBC), the federal agency charged with negotiating indirect cost agreements with tribes and tribal organizations, apparently has reversed its longstanding policy of allowing, without documentation, 50% of tribal council expenses in tribal indirect cost pools when a tribe manages programs under the Indian Self-Determination Act and Education Assistance Act. Under the new policy to be effective in 2008, no such expenses would be allowable as indirect costs unless a tribe could document, through personnel activity reports, the percentage of time council members devoted to managing federal programs. Moreover, government expenses not allowed as indirect costs, but benefiting from activities reflected in the indirect cost pool, would be included in the direct cost base for purposes of calculating tribes' indirect cost rate. These new practices could produce two related—and harmful—results: (1) reduce the amount of the indirect cost pool a tribe would be eligible to recover; and (2) increase the direct cost base, resulting in a lower

indirect cost rate and a further potential reduction in funding for administering federal programs.

The NBC, an agency with the Department of the Interior (DOI), is the "cognizant federal agency" charged with negotiating indirect cost agreements with tribes and tribal organizations carrying out federal grants and contracts, including those under the Indian Self-Determination and Education Assistance Act (ISDEAA). The NBC negotiates indirect cost rates in accordance with Office of Management and Budget (OMB) Circular A-87—for tribes and many tribal organizations—or OMB Circular A-122 for some tribal non-profit organizations. The negotiated rates apply government-wide, not only to agreements with DOI agencies such as the Bureau of Indian Affairs (BIA), but to non-DOI agencies such as the Indian Health Service (IHS).

Before 2003, when the NBC assumed the responsibility for negotiating indirect cost agreements with tribes, the DOI Office of Inspector General (OIG) filled this role.¹ For many years the OIG accepted 50% of tribal council costs as allowable without such documentary justification, recognizing that most Indian and Alaska Native tribal councils perform two distinct functions: a legislative or governmental function; and an executive or business function, including day-to-day management of federally funded programs. Some council activities—such as carrying out government-to-government relations with federal, state and local governments—are not easily allocable to either the legislative or executive function. The 50% rule was a practical approach reflecting the difficulty of reviewing tribal council minutes to determine the precise percentage of council members' time devoted to the management of various federal programs.

In 2000, the OIG proposed to throw out the 50% rule. In an effort to reduce indirect cost rates, and thus reduce indirect cost funding and shortfalls, the OIG proposed requiring documentation of tribal council time spent on federal program to justify any inclusion of such council activity in indirect costs. Tribes and tribal organizations resisted the OIG proposal because the difficulty involved in allocating the time would have been disproportionate to any gains in accuracy or fairness given the relatively small amounts of money involved. Tribal representatives met with OMB, which had issued a letter to OIG on June 12, 2000, supporting the need for documentation of tribal council costs. Ultimately OMB officials agreed with the tribal position that the 50% rule represented a fair and reasonable default rule that spared both tribes and the federal government from unnecessary extra work. Tribes with ISDEAA contracts and compacts seeking to include up to 50% of tribal council costs in their indirect cost pools could do so without further documentation. If they sought to include more than 50%, documentation in the form of tribal council minutes or some other appropriate means would be required. OMB directed the OIG to continue employing the 50% rule, and since 2003 the NBC has apparently done likewise. Now, however, the NBC has revisited the issue.

¹ For some tribal health organizations, the Division of Cost Allocation in the Department of Health and Human Services served, and still serves, this function.

Seven years after the first attempt to disallow tribal council costs without documentation, NBC appears ready to try again. We understand that at least one tribal contractor has received the following language in a letter from the NBC:

While we allowed 50 percent of the general government expenses in your FY 2007 indirect cost rate negotiation, please note that general government expenses (tribal council expenses) are considered an unallowable expense. Salaries and other expenses of the tribal council incurred for purposes of legislation or executive direction are unallowable. However, there may be instances, particularly in smaller tribes, where a council member or chief executive wears two hats. For example, a council member or chief executive might also be the director of the tribe's personnel unit. In such cases, it would be acceptable to charge a pro-rata share of the time or salary of the council member to the indirect cost pool. In order to substantiate these costs, the tribe must document through survey of effort reports for tribal council personnel or by some other reasonable means including personnel activity reports. These procedures are in accordance with 2 CFR 225 (formerly OMB Circular A-87), Appendix B, Section 19, and an OMB letter dated June 12, 2000, addressed to the Department of Interior, Office of Inspector General. (www.nbc.gov/acquisition/ics/documents/pdf/icpproc.pdf) Starting with the FY 2008 indirect cost rate negotiation, tribal council expenses will generally not be allowed in the indirect cost pool. Only the portion of general government salaries and expenses directly attributable to managing and operating federal programs will be allowed in the indirect cost pool if they are adequately documented as described above. Further, the unallowable costs which benefit from indirect costs will receive an appropriate allocation of indirect costs by the inclusion in the appropriate base used to distribute indirect costs in accordance with 2 CFR 225, Appendix A, Section C. 3. b.

Thus, the NBC has reverted to the anti-self-determination policy proposed and discarded in 2000. The NBC language even cites the June 12, 2000 letter that OMB issued before meeting with tribal representatives and agreeing that documentation would not be required if a tribe requested to include only 50% of its tribal council costs as indirect.

We do not believe the 50% rule is inconsistent with either of the two authorities the NBC cites: the June 12, 2000 letter and 2 CFR Part 225 (OMB Circular A-87). While it is true that tribal government expenses are not generally allowable, both the Circular and the OMB letter recognize an exception where the council wears "two hats," carrying out executive as well as legislative functions.² The question is the extent of the documentation required in this situation. The Circular itself does not impose any specific requirement. While the 2000 OMB letter alludes to "survey of effort reports," the OMB itself subsequently determined that requiring such documentation made sense only if a tribe sought to include more than 50% of council costs.

² See 2 CFR Part 225, Appendix B § 19(b) (allowing inclusion of "the portion of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his staff is allowable"); 70 Fed. Reg. 51910, 51918 (Aug. 31, 2005).

We do not know why the NBC has chosen to re-open this issue, or whether the OMB can be persuaded once again that the 50% rule is fair and reasonable. If the NBC is successful in unilaterally throwing out the 50% rule, tribes would be harmed in several ways. First, tribes seeking to include any tribal council costs would face a potentially onerous burden of documentation. Second, the NBC would presumably wield the discretionary power to declare a tribe's documentation unsatisfactory and deny the costs on that basis. Third, any council costs not allowed would go into the direct cost base. With part of the indirect cost pool allocated to the council, a smaller percentage of the pool would be allocated to BIA and IHS programs, resulting in less indirect cost funding from those agencies.

The NBC's apparent intent to impose this new policy on tribes without any tribal consultation appears to violate Executive Order 13175 and the Interior Department's own tribal consultation policy. It may be that a concerted effort by Indian tribes with the assistance of the National Congress of American Indians, the National Indian Health Board, and other intertribal organizations could succeed again in overcoming a federal initiative which seems designed to discourage tribal self-determination and self-governance.

Conclusion

Please let us know if you would like more information about this information or wish us to work with other tribal representative to coordinate a meeting on the matter with the NBC and OMB. We will continue to monitor CSC developments in both the IHS and the BIA on your behalf. Should you have any questions or if we can provide you with assistance, please do not hesitate to contact S. Bobo Dean (sdean@hdsdwdc.com) at (202) 822-8282; or Geoff Strommer (gstrommer@hdsdwor.com) or Steve Osborne (sosborne@hdsdwor.com), both at (503) 242-1745.